

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LORIANN KHANI,

Plaintiff,

v.

REGENCE BLUESHIELD, et al.,

Defendants.

C09-1067Z

ORDER

THIS MATTER comes before the Court on defendants' motion for summary judgment, docket no. 43, and motion for protective order, docket no. 30. Having reviewed all papers filed in support of and in opposition to each motion, the Court enters the following Order.

**Background**

As an employee of the Boeing Company, plaintiff Loriann Khani is eligible for benefits under the Boeing Traditional Medical Plan (the "Boeing Plan"), a defendant in this litigation. Khani Decl. at ¶ 2 (docket no. 48). The Boeing Plan "covers treatment, services, and supplies that are deemed preventive or medically necessary." AR at 688 (docket no. 44-24 at 18). The Boeing Plan outlines the following criteria for determining whether treatment, services, or supplies are medically necessary: (i) required for diagnosis or treatment of an "illness, injury, or condition," (ii) consistent with symptoms or diagnosis,

1 (iii) essential to the patient's needs; (iv) consistent with "good medical practice,"  
2 (v) professionally accepted as "usual, customary, and effective," and (vi) provided on an  
3 inpatient basis only when unsafe to offer on an outpatient basis. *Id.* Certain services and  
4 supplies are specifically excluded by the Boeing Plan, including "[o]besity services or  
5 supplies, unless approved in advance as medically necessary by the service representative  
6 according to written guidelines." AR at 711 (docket no. 44-25 at 1) (emphasis added).

7 The service representative for medical and hospital services under the Boeing Plan is  
8 defendant Regence BlueShield ("Regence"). AR at 684 (docket no. 44-24 at 14). The  
9 written guidelines that Regence must follow in deciding whether to approve obesity services  
10 are not contained in the administrative record submitted by Regence, and such written  
11 guidelines have not been described or discussed in the parties' briefing. The parties agree,  
12 however, that Regence pre-approved obesity services, namely bariatric (gastric bypass)  
13 surgery, for plaintiff, which she underwent in February 2006. *See* Khani Decl. at ¶ 2 (docket  
14 no. 48). As a result of significant weight loss and a chronic cough, plaintiff developed a  
15 large hernia at the site of the surgical incision, as well as infrapannicular rashes, ulcerations,  
16 and infections. AR at 516 (docket no. 44-19 at 6).

17 To address these symptoms, on June 28, 2007, plaintiff had the following procedures:  
18 (i) incisional hernia repair; (ii) panniculectomy (removal of excess abdominal fat, skin, and  
19 subcutaneous tissue); and (iii) abdominal wall reconstruction. AR at 515 (docket no. 44-19  
20 at 5). The parties agree that the incisional hernia repair was medically necessary and should  
21 have been covered under the Boeing Plan. *See* AR at 494 (docket no. 44-18 at 24); AR at  
22 501 (docket no. 44-18 at 31). Regence, however, refused to pre-approve the panniculectomy,  
23 concluding that it was primarily cosmetic in nature and did not meet the criteria for medical  
24 necessity. AR at 494. As a result, plaintiff prepaid the cost of the panniculectomy, which  
25 was \$6,000. Khani Decl. at ¶ 6 (docket no. 48).

1 After the surgery, pursuant to Regence's review process, plaintiff submitted a first  
2 appeal and a second appeal, both of which are mandatory. See AR at 585 (docket no. 44-21  
3 at 15); see also AR at 612-14, 626-29 (docket no. 44-22 at 2-4, 16-19) (first appeal); AR at  
4 637-42 (docket no. 44-22 at 27-29 & docket no. 44-23 at 1-3) (second appeal). The second  
5 appeal was sent for external review by the MAXIMUS Center for Health Dispute Resolution.  
6 AR at 639 (docket no. 44-22 at 29); see AR at 585 (docket no. 44-21 at 15) (indicating that a  
7 second appeal "may be sent to an independent medical professional with appropriate  
8 expertise"). Plaintiff did not pursue a third, voluntary appeal.

9 In her initial appeal, plaintiff sought reimbursement for the \$6,000 she had prepaid for  
10 the panniculectomy. Plaintiff did not raise any issue concerning the abdominal wall  
11 reconstruction, which Regence had already covered. In its letter dated June 27, 2007,  
12 responding to plaintiff's first appeal, Regence indicated that it was "unable to provide  
13 coverage for this service," meaning the panniculectomy. AR at 504 (docket no. 44-18 at 34).  
14 The June 2007 letter did not mention the abdominal wall reconstruction. See AR at 504-05  
15 (docket no. 44-18 at 34-35). On March 20, 2008, Regence sent a letter to plaintiff indicating  
16 that "charges for a complex abdominoplasty were paid in error and will be taken back."  
17 AR at 543 (docket no. 44-20 at 3). An abdominoplasty, often called a "tummy tuck," is a  
18 generally cosmetic procedure for tightening the abdominal muscles and fascia. See Exh. A to  
19 Zubel Decl. (docket no. 37). The operative reports prepared by the surgeons who operated  
20 on plaintiff in June 2007 did not use the term abdominoplasty. See AR at 515-18 (report of  
21 Keith T. Paige, M.D.) and AR at 519-20 (report of Jeffrey A. Hunter, M.D.) (docket  
22 no. 44-19 at 5-10). Dr. Paige's report did, however, specifically refer to a panniculectomy in  
23 the section titled "Procedure Performed." AR at 515.

24 Contemporaneously with the notification to plaintiff, Regence demanded a refund  
25 from Virginia Mason Medical Center ("Virginia Mason") in the amount of \$4,264.44 for  
26 services rendered by Dr. Paige. AR at 541 (docket no. 44-20 at 1). Approximately five and

1 a half months later, on September 8, 2008, Regence notified plaintiff that her second appeal  
2 had resulted in a decision not to extend coverage for the “complex abdominoplasty and  
3 panniculectomy rendered . . . on June 28, 2007.” AR at 556 (docket no. 44-20 at 16).  
4 According to plaintiff, rather than just the \$4,264.44 demanded by Regence, Virginia Mason  
5 actually refunded \$14,028.19 to Regence. Khani Decl. at ¶ 12 (docket no. 48). In addition,  
6 Virginia Mason reversed the negotiated-rate adjustment of \$21,276.45, and then sought  
7 payment from plaintiff for the total amount of hospital charges relating to the surgery  
8 performed in June 2007, namely \$35,304.64. *Id.* Virginia Mason’s collection agency has  
9 sued plaintiff in state court for this sum, and those proceedings are stayed pending the  
10 outcome of this case. *Id.*

#### 11 **Discussion**

12 The parties agree that this matter is governed by the Employee Retirement Income  
13 Security Program (“ERISA”). Under ERISA, plaintiff is entitled to bring this action to  
14 recover benefits due under the terms of the Boeing Plan. *See* ERISA § 502(a)(1)(B),  
15 29 U.S.C. § 1132(a)(1)(B). Defendants Regence and the Boeing Plan seek summary  
16 judgment in their favor as to plaintiff’s ERISA claim. A party is not entitled to summary  
17 judgment unless it demonstrates an absence of genuine dispute of material fact and  
18 entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a) (2010). Defendants  
19 have not made the requisite showing.

20 Under ERISA, a denial of benefits is reviewed under a de novo standard unless the  
21 benefit plan gives the plan administrator discretionary authority to determine eligibility for  
22 benefits or to construe the terms of the plan. *E.g., Montour v. Hartford Life & Accident Ins.*  
23 *Co.*, 588 F.3d 623, 629 (9th Cir. 2009). The administrator for the Boeing Plan is the  
24 Employee Benefit Plans Committee (the “Committee”), which is comprised of Boeing  
25 employees who are appointed by the Boeing Company Board of Directors. AR at 740  
26 (docket no. 44-26 at 1). With respect to the Boeing Plan, the Committee “has the exclusive

1 right, power, and authority, in its sole and absolute discretion, to [a]dminister, apply,  
2 construe, and interpret the Plan . . . [and to d]ecide all matters and questions arising in  
3 connection with entitlement to benefits.” *Id.* The Committee has delegated certain  
4 administrative duties and responsibilities to Regence as service representative for medical  
5 and hospital services. AR at 741 (docket no. 44-26 at 2). When, as here, the benefit plan  
6 grants discretionary authority to the administrator, the denial of benefits is reviewed under an  
7 abuse of discretion standard. *E.g., Montour*, 588 F.3d at 629.

8 The exact contours of the abuse of discretion standard depend on whether and to what  
9 degree the plan administrator has a conflict of interest. *Id.* at 629-32. A conflict of interest  
10 may be structural, as when the entity that funds an ERISA benefits plan also evaluates  
11 claims, or may arise in other ways. *See id.* at 630; *see also Abatie v. Alta Health & Life Ins.*  
12 *Co.*, 458 F.3d 955, 967 (9th Cir. 2006) (“This standard applies to the kind of inherent conflict  
13 that exists when a plan administrator both administers the plan and funds it, as well as to  
14 other forms of conflict.”). In the absence of a conflict of interest, judicial review involves a  
15 “straightforward application of the abuse of discretion standard,” pursuant to which the  
16 denial of benefits “can be upheld if it is ‘grounded on any reasonable basis.’” *Montour*,  
17 588 F.3d at 629 (emphasis in original).

18 On the other hand, when a conflict of interest exists, it must be considered as one of  
19 many relevant factors, including the quality and quantity of the medical evidence, whether  
20 the administrator’s decision was based on an in-person medical evaluation or paper review of  
21 existing records, and whether the independent experts were given “all of the relevant  
22 evidence.” *Id.* at 630. The conflict of interest is given more or less weight based on the  
23 degree to which it appears to have improperly influenced the benefits decision. *Id.* at 631.  
24 Put another way, if the circumstances indicate that the conflict of interest might have “tainted  
25 the entire administrative decision-making process,” the stated reasons for the benefits  
26 decision should be viewed with “enhanced skepticism.” *Id.*; *see also Abatie*, 458 F.3d at 968

1 (“The level of skepticism with which a court views a conflicted administrator’s decision may  
2 be low if a structural conflict of interest is unaccompanied, for example, by any evidence of  
3 malice, of self-dealing, or of a parsimonious claims-granting history. A court may weigh a  
4 conflict more heavily if, for example, the administrator provides inconsistent reasons for  
5 denial, fails adequately to investigate a claim or ask the plaintiff for necessary evidence, fails  
6 to credit a claimant’s reliable evidence, or has repeatedly denied benefits to deserving  
7 participants by interpreting plan terms incorrectly or by making decisions against the weight  
8 of evidence in the record.” (citations omitted)).

9 In this case, defendants have not shown entitlement to summary judgment even under  
10 the more deferential standard applied in the absence of a conflict of interest. In their reply to  
11 plaintiff’s contention that Virginia Mason refunded all of the amounts paid by Regence,  
12 including the costs associated with the incisional hernia repair that Regence concedes should  
13 have been covered under the Boeing Plan, defendants assert that Dr. Hunter was paid for  
14 performing the incisional hernia repair. Whether Dr. Hunter was himself paid, however, is  
15 not the point. The question is whether some portion of the hospital charges related to the  
16 incisional hernia repair were erroneously refunded to Regence. Instead of offering a  
17 “reasonable basis” for denial of benefits undisputedly owed to plaintiff, defendants merely  
18 state that the billing records are not part of the administrative record because they were “not  
19 considered by the Plan in evaluating Ms. Khani’s claim.” Reply at 4 (docket no. 52).

20 To the contrary, the administrative record contains Virginia Mason’s statement of  
21 hospital services dated November 28, 2007, reflecting Regence’s payment of \$14,028.19,  
22 which was subsequently refunded, and a downward adjustment of \$21,276.45, which was  
23 later reversed. AR at 529 (docket no. 44-19 at 19). Among the itemized charges on this  
24 statement are “OR services” in the amount of \$15,708.00, anesthesia in the amount of  
25 \$470.00, supplies in the aggregate amount of \$12,717.50, and pharmacy or drug costs in the  
26 aggregate amount of \$812.25. Defendants fail to provide any basis for associating these

1 expenses solely with the excluded panniculectomy and/or alleged abdominoplasty. To the  
2 extent some portion of these charges were incurred in connection with the incisional hernia  
3 repair, defendants cannot establish a proper exercise of their discretion in failing to review or  
4 consider the itemized statement or in obtaining and retaining a full refund. Thus, with  
5 respect to plaintiff's ERISA claim, defendants have not established that they are entitled to  
6 judgment as a matter of law.

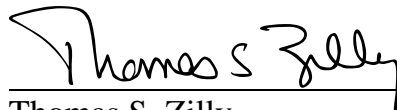
7 **Conclusion**

8 For the foregoing reasons, defendants' motion for summary judgment, docket no. 43,  
9 is DENIED. Defendants' motion for protective order, docket no. 30, which seeks to preclude  
10 plaintiff from taking a Rule 30(b)(6) deposition, is GRANTED. As contemplated in *Kearney*  
11 *v. Standard Ins. Co.*, 175 F.3d 1084 (9th Cir. 1999), this matter will be tried to the bench on  
12 the administrative record. *See id.* at 1094-95. Pursuant to the parties' stipulation, docket  
13 no. 50, the mediation deadline is extended to April 15, 2011. The trial date and the related  
14 deadlines for filing motions in limine, trial briefs, proposed findings of fact and conclusions  
15 of law, and an agreed pretrial order are STRICKEN. The pretrial conference is also  
16 STRICKEN. A status conference is SCHEDULED for Thursday, May 12, 2011, at 11:00  
17 a.m.

18 IT IS SO ORDERED.

19 The Clerk is directed to send a copy of this Order to all counsel of record.

20 DATED this 30th day of March, 2011.

21  
22   
23 Thomas S. Zilly  
24 United States District Judge  
25  
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